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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHELLE OKUMURA et al.,

Defendants and Appellants.

C084467

(Super. Ct. No. 13F06549)

Defendants Michelle Okumura and Jeremy McMahon held Eric Jackson captive for multiple days after they tied him naked to a massage table at gunpoint. When he attempted to gain his freedom by promising to give them money buried on his property, Okumura went to Jackson's home and unsuccessfully dug for the buried loot. Defendants then tortured Jackson by placing hot butter knives on his chest, burning an asterisk pattern into his skin. When Jackson later tried to escape, McMahon shot and killed him. Defendants' resulting police interviews were riddled with inconsistent statements regarding the events leading to Jackson's death.

A jury found defendants guilty of first degree murder, torture, and false imprisonment. While the jury found the torture special circumstance true for McMahon, it found it not true for Okumura. It also found multiple gun allegations true as to both defendants, including a Penal Code¹ section 12022.5, subdivision (a) allegation and a section 12022.53, subdivision (d) allegation attached to McMahon's murder and false imprisonment convictions, respectively. The jury further found McMahon guilty of being a felon in possession of a firearm. In a bifurcated proceeding, the trial court found McMahon had been convicted of a prior serious felony conviction.

On appeal, McMahon argues the jury's true finding for the torture special circumstance was not supported by substantial evidence and joins in Okumura's arguments. Okumura focuses her attention on the felony-murder jury instruction, which relied on robbery as the underlying felony and argues multiple instances of error. Recognizing her attorney did not object to the instruction as worded, Okumura also argues ineffective assistance of counsel. The People contend McMahon has forfeited the claims raised in Okumura's brief for failing to argue with particularity how her arguments are relevant to his posture in this case. We agree. Nevertheless, we reject Okumura's attack on the felony-murder jury instruction. We also reject McMahon's challenge to the torture special circumstance.

In addition to the claims attacking their convictions, both McMahon and Okumura raise several issues regarding their sentencing. McMahon argues we should remand his case for the trial court to exercise its discretion under Senate Bill No. 620 to strike the personal use firearm enhancements attached to his murder and false imprisonment convictions. Since we must remand for the court to impose a sentence on McMahon's false imprisonment conviction, we direct it to also consider its power under Senate Bills

¹ Further section references are to the Penal Code unless otherwise indicated.

Nos. 620 and 1393 to strike McMahon's firearm and prior serious felony conviction enhancements. Okumura argues her case should be remanded so she can make a record for a future youth offender parole hearing. We agree and accordingly remand her case for this purpose. We also order correction of both abstracts of judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I

The Offense

In late September and early October of 2013,² defendants had been dating for five months. They predominantly lived at Okumura's apartment in midtown Sacramento, where she also ran a massage business. Around the time Okumura met McMahon, she also met Jackson and the two agreed to exchange Okumura's massage services for tattoo work Jackson could provide. The two exchanged text messages and images pertaining to tattoo work; however, Jackson also sent Okumura two images of his face and asked her to send him a "close-up" of herself, like a "selfie."

On September 28, Jackson texted Okumura asking for a massage, and Okumura agreed in exchange for \$60 to \$80 of colored tattoo work. Jackson went to Okumura's apartment for the massage and met McMahon. The two men briefly talked before McMahon excused himself to the bedroom so Okumura could give Jackson the agreed-upon massage. After the massage, the two arranged to exchange services in the future.

On the afternoon of October 3, Okumura texted Jackson asking when he wanted his second massage. After checking with McMahon, Okumura agreed to exchange her massage services for marijuana instead of tattoo work. That evening, Jackson texted Okumura when he was close to her apartment and needed to be let in the building for his massage. Jackson again met McMahon in the living room. The two talked, drank beer,

² All dates refer to the year 2013 unless otherwise indicated.

and smoked marijuana before McMahon went to the bedroom so Jackson could get his massage. McMahon was “blacked out” drunk and fell asleep immediately. Unlike the first massage, this massage “went bad” with Jackson allegedly sexually assaulting Okumura.³

Okumura ran to the bedroom to awaken McMahon. She tried to tell him what happened, but he thought she was “trippin’” and went back to sleep. Okumura stayed in the bedroom until Jackson left. When she went back to the living room, she saw Jackson had taken the key to the apartment and the marijuana he had brought as payment for the massage.⁴

The next day Okumura told McMahon about the missing key and marijuana. At first, she did not tell McMahon about the assault because she did not know how he would react; however, within a day she told him about it.⁵ McMahon was mad and spoke with

³ What happened during the second massage is unclear. Okumura told Margaret Jones that a “creepy” client of hers was stalking her and got “ ‘handsy’ ” and “ ‘too friendly’ ” during a massage. She later told a first responder that Jackson was a massage client who had made sexual advances toward her. During Okumura’s initial interview after being arrested, she said Jackson tried to rape her. She specified he touched her breasts and her buttocks, and attempted to take off her pants. During a later interview, Okumura said Jackson hit her and restrained her when he tried to rape her. During yet another interview, Okumura again said Jackson tried to rape her. She specified that he pulled her pants down, tried to initiate oral sex on her, and then pinned her on the massage table, despite her telling him to stop. During trial testimony, Okumura said Jackson initially rubbed her legs, at which time she told him to stop. Then, he got off of the massage table and tried to pin her on it while pulling down her pants. She struggled and Jackson penetrated her vagina with his fingers.

⁴ A few weeks before the incident, defendants installed a deadbolt on the front door of their apartment requiring a key to both enter and exit the apartment. Okumura claimed it was because she and her brother did not get along.

⁵ It is unclear what Okumura told McMahon. During a police interview, Okumura said she told McMahon Jackson tried to touch her legs and back. McMahon, however, told his friend Jesse Detlefsen that someone tried to rape Okumura. During his initial

Jackson on the phone about the incident. On the morning of October 5, Okumura texted Jackson asking if he had taken the key to her apartment. She also made numerous calls to him on that day. During these calls, Jackson threatened Okumura and McMahon and also told them he was part of a gang.⁶

At some point on October 5, McMahon called Jesse Detlefsen asking to borrow a gun. That same day, Detlefsen went to defendants' apartment with Margaret Jones to give McMahon a pistol. Okumura was there too. While there, McMahon told Detlefsen he needed the gun because he was worried the man who sexually assaulted Okumura would come back to the apartment.

At 3:39 a.m., on October 6, Okumura's phone made a call to Jackson's phone. The two phones then exchanged multiple calls and phone logs show there were multiple extended conversations.⁷ Jackson's phone texted Okumura's phone multiple times,

police interview, McMahon told officers Jackson touched Okumura and she told him to stop. Jackson then "stood up he -- grabbed her and bent her over the table and tried to like kind of force them together." In a later interview, McMahon said Jackson got "fresh" with Okumura. During that same interview, McMahon specified Jackson rubbed Okumura's leg, then grabbed her buttocks, at which time Okumura told Jackson to stop. Jackson then bent Okumura over the table and penetrated her vagina with his fingers.

⁶ No evidence was introduced at trial substantiating Jackson's claim he belonged to a gang. Evidence was introduced, however, tending to show Jackson had stalked a woman he met in 2011. He made numerous phone calls and text messages, some of which were sexually explicit in nature, to the woman despite being told to stop on multiple occasions by the woman and by the police. Jackson also went to the woman's home on numerous occasions, at times leaving property outside of her front door. During one such time, Jackson left a bullet for the woman to find.

⁷ Okumura made conflicting statements about the content of her October 6 conversations with Jackson. She told officers Jackson did not have permission to come to her apartment and he used the key he stole to break in. She, however, admitted she told Jackson he could come over to socialize and get a massage but not sleep over. She also told officers she was waiting for Jackson to come over that night and later said Jackson believed he was going to have sex with her.

including one at 4:11 a.m. asking, “[m]ay I come inside and take a little nap?” and another at 4:59 a.m., saying “Honey, I’m home.”

At some point in the early morning hours of October 6, Jackson walked into defendants’ apartment. McMahon was waiting in the bathroom for Jackson’s entry and was in possession of the gun Detlefsen gave him. Okumura was in the kitchen. When Jackson came into the apartment, McMahon pointed the gun and yelled at Jackson to get on the ground. When Jackson did not comply, McMahon shot one or two warning shots into the floor near Jackson and hit him in the back of the head with the gun. McMahon made Jackson take off all of his clothes; defendants also took his wallet and cell phone. Defendants then tied Jackson to the massage table. Throughout this process, McMahon yelled at Jackson about disrespecting Okumura. Okumura checked Jackson’s clothes for weapons and found nothing. Jackson, however, told Okumura and McMahon that he did have a gun, explaining he brought it to the apartment complex the first time he came over for a massage and hid it in the alley behind the complex with some money. McMahon and Okumura did not find the gun or money in the alley when they looked.

Jackson next told defendants he had \$15,000 buried in the front yard of his home and that he would give them half of it if they release him. As a result, Okumura went to Detlefsen’s house to ask for help. She arrived between 6:30 and 7:00 a.m. Although Detlefsen let Okumura borrow a shovel, he refused to help her dig for the money. While at Detlefsen’s house, Okumura said she and McMahon had someone tied up in her apartment. She was also acting strange, like she was on drugs or sleep deprived.

After leaving Detlefsen’s house, Okumura drove to Jackson’s house and dug a hole in his front yard where he told her the money was buried. She did not find any money. After returning to her apartment, Jackson told her the money was actually buried in the backyard. Okumura again went to Jackson’s house and looked for the buried money in the backyard. She was again unsuccessful.

What happened upon Okumura's return is unclear, but what is clear is that Jackson remained in defendants' apartment until approximately 3:00 a.m. on October 8 when he tried to escape in only his boxer shorts by breaking the sliding glass door in the living room. During the course of Jackson's attempt, McMahon shot him once, killing him. Jackson's body showed clear evidence of torture. His nipples had been burned until unrecognizable. He also had a pattern burned into his chest in the shape of a large asterisk. The prongs of the asterisk matched the shape of butter knives found in defendants' kitchen. Jackson had a bruise on the back of his head and small cuts throughout his body consistent with having been exposed to shattering glass. Jackson also had shoestrings and cords tied to his wrists, his ankles, and one around his neck.

Officers found an apology note dated "Sunday a.m." signed and appearing to be written by Jackson. The note said: "Eric Jackson, I am fully apologetic for my actions. I was in the wrong for coming to a second massage session and abusing my rights as a client." Okumura appeared under the influence of a mood depressing drug and later admitted she had taken ten sleeping pills, if not other unknown medications, earlier in the night.

II

Defendants' Subsequent Statements

Defendants gave multiple police interviews over the course of the next 15 hours. During Okumura's first interview, she gave confusing and conflicting statements. She initially said she shot Jackson in self-defense when he broke into her apartment, but later said it was when he allegedly sexually assaulted her. Upon confrontation with conflicting evidence, Okumura admitted to tying Jackson to the massage table on October 5 or 6 without his permission. She claimed to not know how he got the burns on his chest, but maintained throughout the entire interview that she was the person who shot Jackson.

Okumura was much more coherent during her next interview. She stated from the start and throughout the interview that she did not shoot Jackson. She maintained she did

not know how Jackson got burned and said she and McMahon did not torture him.

Midway through the interview, Okumura claimed Jackson asked her to burn him because it brought him pleasure. She claimed Jackson showed her how he wanted to be burned and that she heated up butter knives to do it. Okumura also identified the knives from her kitchen she used to burn Jackson. She further claimed Jackson wanted to be tied to the massage table because he was aroused by it.

During McMahon's first interview, he said he was passed out drunk in his bedroom when the noise of the sliding glass door shattering awakened him. He ran to the living room, where Jackson was dead on the floor. He denied knowing how it happened and how Jackson got burned, but admitted he knew Jackson and that Jackson had sexually assaulted Okumura.

Officers confronted McMahon with two video recordings on his phone. The first recording was taken at 10:06 a.m., on October 6 and was of Jackson using a toilet with bindings on his wrists. A male voice can be heard saying, "[t]his is what you get for breaking into my house. Doing me faulty. Wait til the cops get here." The second video showed Jackson naked and bound to the massage table. A male voice could be heard saying, "ready?" and a female voice responds, "what?" Immediately after, Jackson screams. It is not clear from the video why Jackson screamed, and any injury to his chest is difficult to discern because of picture quality. Photos taken by McMahon's phone show images of Jackson both on the toilet with bindings on his wrists, and while bound to the table with wrist, ankle and neck bindings. One photo of Jackson bound to the table was taken on October 7 at 1:07 p.m. The image shows Jackson nude with a burn on his chest in the shape of an "X."

Officers told McMahon at the start of his next interview that Okumura said McMahon had shot Jackson. After explaining that Okumura was extremely intoxicated from prescription drugs and that he was not taking his prescribed medication for bipolar disorder, McMahon confessed to shooting Jackson. He also admitted to his mother

during a jail call the same night that, “[s]ome dude tried to rape [Okumura] and I [McMahon] held him for three days, tortured him, and then murdered him.”

Okumura and McMahon were then allowed to talk with each other. During that conversation, the two talked about their legal options and the crime. McMahon told Okumura that he did not want her to take responsibility because she was “doped up the whole fuckin’ time” and unable to communicate with him. After saying she was going to tell officers the truth, Okumura admitted she was the person who burned Jackson. McMahon admitted multiple times he was the person who shot Jackson.

Following defendants’ conversation, McMahon spoke again to officers. He explained he shot Jackson when Jackson tried to escape, and that Okumura had nothing to do with the death. When asked about torturing Jackson, McMahon replied, “I mean, let’s put it this way man. I’ll say it, everything was all me whatever, as long as [Okumura] walks” He claimed to have used a blow torch to burn Jackson.

During Okumura’s subsequent interview, she said she took care of Jackson’s burns so they would heal. She, however, also said she wanted Jackson to learn that what he did to her was wrong. Although she did not want him to die, the burns were retribution “in a way.” She claimed Jackson was shocked by the first burn but started to enjoy being burned and never asked her to stop. She also said McMahon shot Jackson during a scuffle while Jackson tried to escape.

At trial, Okumura testified it was not until the evening on the second day Jackson was held captive that he was tortured. She claimed she had nothing to do with it, but first learned of the possibility when she was in the kitchen and saw four knives sticking out of a burner on the stove. McMahon told her to leave the knives alone and go to the bedroom when she tried to take them out. Okumura complied with his demand. When she later came out of the bedroom, Jackson read an apology letter to her. Okumura noticed burns on Jackson’s chest for the first time then. She testified she admitted to shooting and torturing Jackson during her police interviews to protect McMahon.

DISCUSSION

I

McMahon Forfeited The Issues Raised In Okumura's Opening Brief

McMahon filed his opening brief before Okumura filed hers and preemptively joined the arguments raised by “Okumura to the extent such arguments may be to his benefit.” He further reserved the right to file a supplemental brief to make a showing of those claims’ relevance to his case; however, he never filed a supplemental brief arguing the issues relevant to him. Instead, McMahon replied to the People’s briefing agreeing with Okumura that the jury instruction on felony murder was given in error, along with the court’s instruction on the escape rule, and the court’s failure to instruct on the logical nexus requirement of felony murder. He asserts these errors were prejudicial in regard to him because he was convicted of first degree murder based on a felony-murder theory.

While unable to respond to the arguments contained in McMahon’s reply brief, the People urge us to conclude McMahon forfeited the claims raised in Okumura’s brief for failing to “provide particularized arguments in support of his ability to seek relief on those grounds and fail[ing] to demonstrate what if any particular prejudice he suffered.” We agree.

It is not for us or the People to determine which of Okumura’s claims apply to McMahon. McMahon argues Okumura’s briefing on the issues was sufficient as far as his interests were concerned, but that is not at all clear. For example, part of Okumura’s argument is that because there is an insufficient logical nexus between the felony and murder, the court erred in instructing on the felony-murder theory or, at the very least, should have provided a pinpoint instruction on this principle to the jury. While never directly addressed, our Supreme Court authority suggests the logical nexus showing is required only for a nonkiller accomplice and not the direct perpetrator of the murder -- such as McMahon. (See *People v. Cavitt* (2004) 33 Cal.4th 187, 193 (*Cavitt*).) Other

authority suggests otherwise. (See *People v. Wilkins* (2013) 56 Cal.4th 333, 346; *People v. Ford* (1966) 65 Cal.2d 41, 56-57.)

“Appellate counsel for the party purporting to join some or all of the claims raised by another are obligated to thoughtfully assess whether such joinder is proper as to the specific claims and, if necessary, to provide particularized argument in support of his or her client’s ability to seek relief on that ground. If a party’s briefs do not provide legal argument and citation to authority on each point raised, ‘ “the court may treat it as [forfeited], and pass it without consideration.” ’ ” (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 363.) We also disregard arguments raised for the first time in a party’s reply brief, as its inclusion there does not afford the opposing party a meaningful opportunity to respond. (*Hernandez v. Vitamin Shoppe Industries, Inc.* (2009) 174 Cal.App.4th 1441, 1461, fn. 10; *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 482, fn. 10.) McMahon therefore forfeited the issues raised in Okumura’s brief.

II

Sufficient Evidence Supports The Jury’s True Finding On McMahon’s Torture Special Circumstance

McMahon contends the evidence was insufficient to support the torture special circumstance. We disagree.

The principles governing our assessment of McMahon’s challenge to the sufficiency of the evidence are well settled. “We ‘ “ ‘must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ ” ’ [Citation.] The same standard applies when examining the sufficiency of the evidence supporting a special circumstance finding. [Citation] ‘Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence.’ ” (*People v. Brooks* (2017) 3 Cal.5th 1, 57.)

To prove a torture special-circumstance allegation, the prosecution must establish “ ‘defendant intended to kill and had a torturous intent, i.e., an intent to cause extreme pain or suffering for the purpose of revenge, extortion, persuasion, or another sadistic purpose.’ ” (*People v. Brooks, supra*, 3 Cal.5th at p. 65.) The torture special circumstance requires “ ‘some proximity in time [and] space between the murder and torture’ . . . [and] obviously does not apply where ‘no connection’ between the two events appears.” (*People v. Bemore* (2000) 22 Cal.4th 809, 843.) McMahon argues the evidence was lacking here “because he did not personally do an act inflicting torture and the passage of time from when Okumura burned Jackson to when McMahon shot him, failed to support an inference that this was a murder involving the infliction of torture as intended by the torture-murder special circumstance allegation.”

We disagree with McMahon’s factual contention that he was not personally involved in the torture. McMahon interprets the facts in the light most favorable to himself, but we are compelled to interpret them in the light most favorable to the judgment. (*People v. Brooks, supra*, 3 Cal.5d at p. 57.) While Okumura confessed to causing Jackson’s burns and McMahon’s confession failed to account for how the burns occurred, sufficient evidence existed showing McMahon also inflicted extreme pain and suffering on Jackson. Okumura testified it was McMahon who burned Jackson so that Jackson would apologize to her, which Jackson did by writing her an apology letter officers found in defendants’ apartment. McMahon also took video of Jackson screaming in pain while bound to the massage table in reaction to something McMahon did to him. While it is clear from the video that McMahon was not burning Jackson’s chest with butter knives at that moment, it is apparent that McMahon intentionally inflicted extreme pain of some sort. Also, McMahon told his mother during a jail call that he tortured Jackson before killing him. Based on the video, McMahon’s confessions and phone call, and Okumura’s testimony, sufficient evidence supports a finding McMahon personally inflicted extreme pain on Jackson.

We further reject McMahon's factual contention Jackson was tortured 15 hours before his death. To support this contention McMahon points to a video from his phone taken around 1:00 p.m. on October 7 showing "burn marks on [Jackson's] bare chest." While some injury is discernible from the video, it is not at all clear the extent of Jackson's burns. Further, an officer described a photo taken at the same time, which was not made part of the appellate record, as showing burns on Jackson's chest in the shape of an "X." From this description, it does not appear Jackson had yet experienced the full extent of the burns he would before his death when the photo and video were taken at 1:00 p.m. Indeed, Okumura testified that it was not until the evening hours of October 7 that Jackson was tortured. Viewing these facts in the light most favorable to the judgment, sufficient evidence supports the jury's finding that McMahon tortured Jackson within the meaning of the torture special circumstance.

In *Odom*, a group of defendants engaged in a beating of the victim before hog-tying and shooting him in the head as punishment for stealing a PlayStation. (*People v. Odom* (2016) 244 Cal.App.4th 237, 240-243, 247.) They left his body in a bedroom for several hours and then put him in a car they hid from view where he died. (*Id.* at pp. 241, 243-244.) The court found sufficient evidence supporting the torture special circumstance because "the jury could well have found a course of conduct whereby [the victim] was tortured over a sustained period of time." (*Id.* at p. 249.) This conduct did not merely include the victim's beating but also hog-tying and leaving him to die. Citing *Bemore*, the court noted the Legislature intended the torture special circumstance to encompass acts of torture occurring within a larger time frame than that necessary for a conviction of murder by torture -- necessarily including those that would not have caused death. (*Odom*, at p. 249.)

Here, Jackson was tortured through a course of conduct that did not start and end with hot butter knives charring the skin on his chest. Upon entry to defendants' apartment, McMahon pistol-whipped Jackson, forced him to get naked, and tied him to a

massage table, not only by his hands and feet but also by his neck. Jackson remained there over the course of two full days, untied on the rare occasion to use the restroom. After burning Jackson with butter knives, defendants left Jackson tied to the table, in pain and without medical attention, until he tried to escape and McMahon shot him. This course of conduct, which evidenced McMahon's intent to cause Jackson extreme pain and suffering in retribution for his alleged sexual assault of Okumura, led to Jackson's death.

Acknowledging his entire course of conduct may be taken into consideration when assessing whether sufficient evidence exists to support the torture special circumstance, McMahon cites *People v. Barnett* (1998) 17 Cal.4th 1044 as a case unlike his own. In *Barnett*, the victim was heard screaming in pain while the defendant took him off alone to tie him to a tree in the woods. (*Id.* at p. 1074.) The victim was discovered dead the next day in his Jeep with multiple shallow puncture wounds and eight stab wounds, two of which were fatal. (*Id.* at pp. 1071, 1075, 1076-1077.) The court determined the evidence provided a sufficient nexus between the torture and the murder whether the jury determined the defendant stabbed the victim before or after tying him to the tree. To this end the court explained, "the evidence established that [the] defendant never freed or relinquished control over [the victim] from the time of the torture to the time of the murder. That [the victim] was left alone naked and tethered to a tree to suffer from his injuries until [the] defendant returned to fatally stab him was not sufficient to separate the torture from the murder." (*Id.* at p. 1162.)

McMahon argues *Barnett* is distinguishable from his case because "the evidence failed to show Jackson was continuously tied to the massage table until he was killed." We are not persuaded. Whether Jackson was untied after the torture is beside the point. Jackson was naked and held captive in defendants' apartment at gunpoint after all of his belongings had been taken from him. He was not free to leave and remained under defendants' control from the time the torture started until the time he was murdered.

Because McMahon “never freed or relinquished control over [the victim] from the time of the torture to the time of the murder” the evidence was sufficient to establish that Jackson’s death occurred during the course of his torture. (*People v. Barnett, supra*, 17 Cal.4th at p. 1162.) Accordingly, sufficient evidence supports the jury’s true finding for the torture special circumstance.

III

There Was No Instructional Error

The jury was instructed on the elements of felony murder for a direct perpetrator using the pattern jury instruction. It was then orally instructed as follows, also utilizing the pattern instruction: “To decide whether the defendants committed robbery or attempted robbery, please refer to the separate instructions on that crime. You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder. The defendant must have intended to commit the felony of robbery or attempted robbery before or at the time he or she caused the death.

“The crime of robbery or attempted robbery continues until a defendant has reached a place of temporary safety. It is not required that the person die immediately as long as the act causing death occurred while the defendant was committing the felony. Defendants may also be guilty of first degree murder under a theory of felony murder even if another person did the act that resulted in death. I will call the other person the perpetrator.

“To prove that a defendant is guilty of first degree murder under this theory, the People must prove that: A defendant committed or aided and abetted robbery or attempted robbery; the defendant intended to commit or intended to aid and abet the perpetrator in committing the robbery or attempted robbery; or if the defendant did not personally commit robbery or attempted robbery, then a perpetrator committed robbery or

attempted robbery and while committing the robbery or attempted robbery the defendant or perpetrator caused the death of another person.”

The court went on to again explain the death need not be intentional, and then directed the jury to the instructions on robbery and aiding and abetting. The court concluded the felony-murder instruction by stating, “[y]ou must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder. The defendant must have intended to commit or aided and abetted the felony of robbery or attempted robbery before or at the time that the defendant caused the death. You may not find the defendant guilty of felony murder unless all of you agree that the defendant or a perpetrator caused the death of another. You do all need to agree, however, whether the defendant or a perpetrator caused that death.”

As part of the robbery instruction, the jury was instructed, “[t]he crime of robbery continues until the perpetrators have actually reached a place of temporary safety. The perpetrators have reached a place of temporary safety if they have successfully escaped from the scene, and they are not or are no longer being chased, and they have unchallenged possession of the property, and they are no longer in continuous physical control of the person who is the target of the robbery.” The court instructed that aiders and abettors are subject to the same legal principles but “[t]o be guilty of robbery or attempted robbery . . . the defendant must have formed the intent to aid and abet the commission of the robbery or attempted robbery before or while a perpetrator carried away the property to a place of temporary safety.” The jury was also provided written copies of this instruction to use during deliberation.

Okumura brings multiple challenges to the giving of these instructions, including that the cumulative effect of the erroneous instruction amounted to prejudicial error. We disagree on all points.

“The trial court has a duty to instruct the jury on all principles of law relevant to the issues raised by the evidence [citation] and a correlative duty to refrain from

instructing on irrelevant and confusing principles of law.” (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1250) “ ‘[U]nsupported theories should not be presented to the jury.’ ” (*People v. Marshall* (1997) 15 Cal.4th 1, 40.)

“The court has no duty to give an instruction if it is repetitious of another instruction also given.” (*People v. Barajas* (2004) 120 Cal.App.4th 787, 791.) “Review of the adequacy of instructions is based on whether the trial court ‘fully and fairly instructed on the applicable law.’ [Citation.] ‘ “In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.” [Citation.]’ [Citation.] ‘Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.’ ” (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

We apply a de novo standard of review. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.)

A

The Court Properly Instructed On The Felony-Murder Theory And Counsel Was Not Ineffective For Failing To Object To The Court’s Giving Of The Instruction

Okumura contends felony murder based on robbery or attempted robbery was an invalid theory of guilt and it was improper for the court to instruct on that theory. She claims the robbery of Jackson’s clothing, wallet, and cell phone was integral to his murder, while at the same time claims it had nothing to do with the murder. She further argues the attempt to dig up the promised \$15,000 on Jackson’s property was not an attempted robbery and could not provide the basis for a felony-murder conviction. We disagree. We need not determine whether the attempted dig of the \$15,000 constituted an attempted robbery because we conclude the robbery of Jackson’s cell phone, wallet, and clothing provided substantial evidence for the felony-murder jury instruction.

Felony murder does not require an intent to kill, but only an intent to commit the underlying felony. (*People v. Gonzalez* (2012) 54 Cal.4th 643, 654.) “[T]he killing need not occur in the midst of the commission of the felony, so long as that felony is not merely incidental to, or an afterthought to, the killing.” (*People v. Proctor* (1992) 4 Cal.4th 499, 532.)

Citing *People v. Green* (1980) 27 Cal.3d 1, Okumura contends the robbery of Jackson’s property at gunpoint was incidental to the murder because defendants robbed Jackson for the purpose of avoiding detection. Okumura’s reliance on *Green*, however, is misplaced. In *Green*, the defendant took his wife to a secluded place and shot her, resulting in her death. After he shot her, defendant took her identifying information to avoid detection. (*Id.* at pp. 12, 15-16, 62.) Our Supreme Court held that because there was no independent purpose to the robbery beyond the defendant’s purpose to murder his wife, the defendant could not also be subject to the felony-murder special circumstance. (*Id.* at pp. 61-62.)

The *Green* court explained the rationale for the so-called “independent felonious purpose” rule is tied to the Legislature’s intent in enacting the felony-murder special circumstance. The *Green* court reasoned, “the Legislature must have intended that each special circumstance provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not. . . . The [felony-murder special circumstance] provision thus expressed a legislative belief that it was not unconstitutionally arbitrary to expose to the death penalty those defendants who killed in cold blood in order to advance an independent felonious purpose, e.g., who carried out an execution-style slaying of the victim or witness to a holdup, a kidnaping, or a rape. [¶] The Legislature’s goal is not achieved, however, when the defendant’s intent is not to steal but to kill and the robbery is merely incidental to the murder. . . .” (*People v. Green, supra*, 27 Cal.3d at p. 61, fn. omitted.)

On the other hand, “[t]he purpose of the felony-murder rule is to deter those who commit the enumerated felonies from killing by holding them strictly responsible for any killing committed by a cofelon, whether intentional, negligent, or accidental, during the perpetration or attempted perpetration of the felony.” (*Cavitt, supra*, 33 Cal.4th at p. 197.) Our Supreme Court first used the “merely incidental” language in the context of the felony-murder doctrine in *People v. Hernandez* (1988) 47 Cal.3d 315. There, the defendant argued the felony-murder doctrine did not apply because the underlying felony -- rape -- was complete at the time of the homicide. (*Id.* at p. 348.) In rejecting that argument, the *Hernandez* court acknowledged the independent felonious purpose rule discussed in felony-murder special circumstance cases. It noted the question is not of simple chronology but “[i]nstead the focus is on the relationship between the underlying felony and the killing and whether the felony is merely incidental to the killing, an afterthought.” (*Ibid.*)

While our Supreme Court has since repeated the “merely incidental” language in describing the felony-murder doctrine, Okumura does not direct us to a single case in which a court has held felony-murder doctrine instructions were improper because the independent felonious purpose rule was not satisfied. Thus, it is far from clear that our Supreme Court has imported the “independent felonious purpose” rule wholesale into the felony-murder doctrine context, as Okumura would have us do. (See *People v. Andreasen* (2013) 214 Cal.App.4th 70, 82, fn. 7 [“We note that, for felony murder, [our] Supreme Court has at times stated the felony must not be merely incidental to the killing. [Citation.] However, this principle does not appear to have been developed as a distinct requirement akin to the independent-felonious-purpose rule applied to the felony-murder special circumstance”].)

In any event, to the extent an independent felonious purpose is required for the felony-murder doctrine to apply, that purpose was satisfied here. Indeed, unlike *Green*, defendants had no intention of killing Jackson at the time they robbed him. Defendants

may have been trying to avoid detection as Okumura argues, but it was not for murder and it was not from the police. Defendants robbed Jackson to render him vulnerable so they could then hold him captive and torture him. They took his phone so he could not call the gang he claimed to be part of for help, in the process also preventing Jackson from seeking help from anybody else.

Okumura argues the robbery was integral to the murder because it was integral to her and McMahon's overall plan to torture Jackson, which then led to his murder. This is precisely the point of felony-murder liability. Defendants engaged in the enumerated felony of robbery for a purpose other than murder, during the course of which the victim died. The fact that the felony eventually led to the death of the victim does not serve to integrate the two crimes, but serves to provide the basis for felony-murder liability. (*Cavitt, supra*, 33 Cal.4th at p. 197.)

Neither does the two days between the robbery and the murder make the two unrelated. In *Cavitt*, our Supreme Court held that, "the felony-murder rule requires both a *causal* relationship and a *temporal* relationship between the underlying felony and the act resulting in death. The causal relationship is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the nonkiller committed or attempted to commit. The temporal relationship is established by proof the felony and the homicidal act were part of one continuous transaction." (*Cavitt, supra*, 33 Cal.4th at p. 193.) Okumura argues both the continuous transaction and logical nexus elements of felony murder are missing here because the robbery ended two days before Jackson was shot, separating the felony from the murder in both time and purpose. We disagree.

The escape rule provides a killing that occurs during a robbery will be deemed murder unless it occurs after the robber has reached a place of temporary safety, that is, has eluded pursuers, and is in unchallenged possession of the stolen property. (See *People v. Boss* (1930) 210 Cal. 245, 250-251.) If the defendant exercises continuous

control over the victim, however, the defendant's safety is continuously in jeopardy because the victim might escape or signal for help. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 101.) Thus, although for other reasons a robbery is deemed complete upon "asportation," that is, at the moment of the taking of property by force or fear (see *People v. Navarette* (2003) 30 Cal.4th 458, 502), for felony-murder purposes, a robbery is not deemed complete until the perpetrator has escaped (see *People v. Burney* (2009) 47 Cal.4th 203, 246, fn. 13). The escape rule both extends felony-murder liability to deaths occurring during a perpetrator's flight and limits liability, because a killing that occurs after the perpetrator reaches a place of temporary safety does not constitute a felony murder. (See *People v. Wilkins, supra*, 56 Cal.4th at pp. 341, 343-348.) Thus, felony-murder liability may be found in the absence of a strict causal or temporal relationship between the underlying felony and the killing so long as it is proven that the crime and the killing were part of one continuous transaction, including flight prior to escape. (See *id.* at pp. 340-342.) But "the escape rule establishes the 'outer limits of the "continuous-transaction" theory.'" (*Id.* at p. 345.)

Okumura claims the escape rule is inapplicable to her case because the robbery occurred in her home -- a place of safety for her. We are not persuaded. The safety of any one place is not determined by a defendant's familiarity with it or "based on subjective impressions or recklessness of the robber but on an objective measure of safety following the initial taking." (*People v. Haynes* (1998) 61 Cal.App.4th 1282, 1292; *People v. Johnson* (1992) 5 Cal.App.4th 552, 559-560.) Evidence may support the conclusion that no place of temporary safety has been reached while the robber is still encumbered with the victim, "who at first opportunity might call the police." (*People v. Fields* (1983) 35 Cal.3d 329, 364.) Thus, substantial evidence showed a temporal relationship existed between the robbery and murder.

We further reject Okumura's contention there was no causal relationship between the robbery and murder. She argues there was no logical nexus linking the robbery with

the murder because the time Jackson spent under her and McMahon's control was for the exclusive purpose of torturing Jackson. Okumura relies on *Ford*, where after committing a robbery, the defendant kidnapped the victim, drove him to another house, where the defendant committed another crime, then drove aimlessly over a great distance. He spent some of the robbery proceeds, and was not attempting to escape the robbery when he shot a police officer who was pursuing him for reasons unrelated to the robbery. (*People v. Ford, supra*, 65 Cal.2d at pp. 47-48.) The court held the murder did not occur during the course of the robbery. (*Id.* at p. 57.) In making its decision, the *Ford* court considered the approximate four-hour time lapse between the robbery and the shooting and that the officer's pursuit was unrelated to the robbery as was the officer's resulting conduct and the defendant's reaction. (*Id.* at pp. 56-57.)

Ford is distinguishable because the victim there, a police officer, was not the robbery victim. (*People v. Ford, supra*, 65 Cal.2d at pp. 47-48.) Here, although almost two days had elapsed between the robbery and the murder, the victim of both crimes was the same -- Jackson. Further, his death occurred in the same location where he was robbed, unlike the victim in *Ford* who was driven a great distance away from the site of the robbery for no particular purpose. (*Ibid.*)

This case is like *Cavitt*, where defendants James Cavitt and Robert Williams were convicted in separate trials of the felony murder of 58-year-old Betty McKnight, the stepmother of Cavitt's girlfriend, Mianta McKnight. Defendants admitted plotting with Mianta to enter the McKnight home, to catch Betty unawares and tie her up, and to steal Betty's jewelry and other property. One evening, with Mianta's assistance, the plan went forward. Defendants entered the house, threw a sheet over Betty's head, bound this hooded sheet to her wrists and ankles with rope and duct tape, and escaped with guns, jewelry, and other valuables from the bedroom. Betty was beaten and left hog-tied, facedown on the bed. Before leaving, defendants made it appear that Mianta was a victim by pretending to tie her up as well. By the time Mianta untied herself and called

her father to report the burglary-robbery, Betty had died from asphyxiation. (*Cavitt, supra*, 33 Cal.4th at p. 193.)

There was ample evidence at trial to support a finding that the defendants were the direct perpetrators of the murder. However, there was also evidence that tended to support the defense theory, namely, that Mianta deliberately suffocated Betty, for reasons independent of the burglary-robbery, after defendants had escaped and reached a place of temporary safety. Defendants asserted the felony-murder rule would not apply to this scenario and the trial court's instructions erroneously denied the jury the opportunity to consider their theory. (*Cavitt, supra*, 33 Cal.4th at p. 193.) In rejecting the defendants' argument, our Supreme Court held that even if Mianta killed Betty out of private animus, and not to aid or promote the robbery-burglary, the felony-murder rule would apply to Cavitt and Williams. The homicide was not unrelated to the burglary-robbery because Betty was the target of those felonies. (*Id.* at p. 204.)

Here, we reach the same conclusion. There is substantial evidence of a logical nexus between the robbery and killing of Jackson. Defendants remained in control of Jackson and in possession of the items they stole from him the entire two days between robbing and killing him. By robbing him at gunpoint, defendants' rendered Jackson naked and without his phone. Being without his personal effects, Jackson's only option was to physically escape from defendants' apartment. In the process of doing so, McMahan shot and killed him. Thus, substantial evidence supported the logical nexus requirement of felony murder.

Because the robbery was not incidental to Jackson's murder, nor completely unrelated to it, substantial evidence supported Okumura's guilt of first degree murder on a felony-murder theory. Accordingly, the court did not err by instructing the jury on this theory. For the same reason, Okumura's counsel was not ineffective for failing to object to the giving of this instruction. (*People v. Thomas* (1992) 2 Cal.4th 489, 531 [it was not unreasonable for counsel to refrain from making a meritless objection].)

B

The Court Did Not Err By Instructing The Jury On The Escape Rule And Counsel Was Not Ineffective For Failing To Object To Its Inclusion In The Instruction

Okumura contends the court erred by instructing the jury that the crime of robbery continues until defendants have reached a temporary place of safety. She argues the escape rule was inapplicable because there was no evidence defendants fled after the robbery. We disagree.

As explained, “the escape rule, as applied in the context of the felony-murder doctrine and certain other ancillary consequences of robbery, ‘robbery is said to continue through the escape to a place of temporary safety, whether or not the asportation of the loot coincides with the escape’ ” (*People v. Gomez* (2008) 43 Cal.4th 249, 256, fn. 5.) The escape rule originated in the felony-murder context, but has “been extended to other contexts requiring proof that an act occurred in the commission of a crime -- such as inflicting great bodily injury in the course of commission of a crime [citation], kidnapping for purposes of robbery [citation], and use of a firearm in the commission of a robbery [citation].” (*People Wilkins, supra*, 56 Cal.4th at p. 341.) In such felony murder and other cases, the “purpose of the escape rule is to measure the *duration* of a robbery, in order to determine whether a killing or some other act has occurred in the perpetration or commission of the robbery.” (*People v. Rodriguez* (2015) 235 Cal.App.4th 1000, 1007.)

The escape rule relates the temporal aspect of felony murder and was “designed to be used ‘[i]f the evidence raises an issue of whether the felony and the homicide were part of one continuous transaction.’ ” (*People v. Wilkins, supra*, 56 Cal.4th at p. 348.) While this may be implicated with regularity when a defendant flees the robbery he or she just committed, we have not come across any authority suggesting the act of fleeing is a prerequisite to instructing on the escape rule, as Okumura argues.

Here, whether the felony and murder occurred as part of one continuous transaction was an issue raised by the evidence. Jackson's murder occurred two days after he was robbed at gunpoint and tied naked to a massage table in defendants' apartment. Okumura left the apartment multiple times during those two days but always came back. Her ventures outside of the apartment were related to Jackson in that she was attempting to uncover \$15,000 he buried in his yard or get him food. The number of days between the robbery and murder, considered with Okumura's activity during that time period, raised the issue of whether the felony and murder occurred during one continuous transaction. Thus, the court properly instructed on that issue.⁸ For the same reasons, defendant's counsel was not ineffective for failing to object to the jury instruction explaining the escape rule. (*People v. Thomas, supra*, 2 Cal.4th at p. 531.)

C

The Court Had No Sua Sponte Duty To Instruct On The Logical Nexus Requirement And Counsel Was Not Ineffective For Failing To Request Such Instruction

Okumura contends the trial court erred in failing in its sua sponte duty to instruct the jury on the logical nexus requirement for felony murder. She acknowledges trial courts usually do not have a duty to instruct on the logical nexus requirement, but contends the trial court had such a duty here because the logical nexus linking Jackson's robbery to his death was at issue. We disagree.

Cavitt held that "[t]he existence of a logical nexus between the felony and the murder in the felony-murder context, like the relationship between the robbery and the murder in the context of the felony-murder special circumstance [citation], is not a separate element of the charged crime but, rather, a clarification of the scope of an

⁸ Relying on *Ford*, Okumura argues that as a matter of law the robbery of Jackson had ceased. We have already distinguished *Ford* from Okumura's case and disagree that as a matter of law the robbery had ended by the time of Jackson's death.

element. [Citation.] . . . [¶] Hence, if the requisite nexus between the felony and the homicidal act is not at issue and the trial court has otherwise adequately explained the general principles of law requiring a determination whether the killing was committed in the perpetration of the felony, ‘it is the defendant’s obligation to request any clarifying or amplifying instructions on the subject.’ ” (*Cavitt, supra*, 33 Cal.4th at pp. 203-204.)

Applying these principles here, we conclude the trial court had no sua sponte duty to more specifically instruct on the logical nexus requirement because the evidence did not raise an issue as to its existence. Indeed, the record we have already described, including the evidence that defendants robbed Jackson of all his belongings, kept him in the same place for two days without his property, and then killed him when he tried to escape, more than supports our conclusion. Defendants did not leave the apartment and commit crimes against other victims, dispose of the property they took, or murder someone unrelated to the robbery like the defendant in *Ford*. (*People v. Ford, supra*, 65 Cal.2d at pp. 47-48.) Simply put, “on this record, one could not say that the homicide was completely unrelated, other than the mere coincidence of time and place, to the . . . robbery.” (*Cavitt, supra*, 33 Cal.4th at p. 204.)

Even if a contrary argument could be made, we would nonetheless conclude that, given the totality of the jury charge in this case, there is no reasonable likelihood the jury misunderstood or misapplied the applicable law notwithstanding the court’s failure to give the logical-nexus instruction. (See *People v. Barajas, supra*, 120 Cal.App.4th at p. 791.) The instructions given advised the jury that, to be guilty of felony murder, it needed to find, among other things, that Okumura committed or aided and abetted the commission of a felony (with intent to do so) and, “while committing robbery or attempted robbery the defendant or perpetrator caused the death of another person.” The instructions further advised: “The defendant must have intended to commit or aided and abetted the felony of robbery or attempted robbery before or at the time that the defendant caused the death.” Additionally, the jury was told “[i]t is not required that the

person die immediately as long as the act causing death occurred while the defendant was committing the felony.” These instructions, read together, and without more, adequately apprised the jury of the need for both a temporal connection and a logical nexus between the felony robbery and homicide in this case to support Okumura’s conviction. (Accord, *People v. Crone* (1997) 54 Cal.App.4th 71, 76; see also *People v. Barajas*, *supra*, 120 Cal.App.4th at p. 791 [a court has no duty to give an instruction “repetitious of another instruction also given”].)

Accordingly, based upon the record as a whole, we reject Okumura’s claim that, but for the claimed instructional error, it was reasonably probable the jury would have acquitted her of felony murder. (See *People v. Crone*, *supra*, 54 Cal.App.4th at pp. 78-79.) We further reject Okumura’s argument the purported instructional error violated her federal due process rights, requiring application of the more stringent standard of prejudice. (See *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705] [reversal required unless the prosecution proves that it is clear beyond a reasonable doubt the jury would have convicted the defendant of the charged crime notwithstanding the error].) As our Supreme Court has explained, “federal law has no effect on the appropriate standard of California appellate review when, in a noncapital case, the defendant challenges his otherwise valid conviction of a charged offense on grounds the trial court failed *in its sua sponte duty* under California law to provide [correct and complete] instructions” (*People v. Breverman* (1998) 19 Cal.4th 142, 172.) For the same reasons, we conclude Okumura’s counsel was not ineffective for failing to request a pinpoint instruction on the logical nexus requirement of felony murder. (See *Strickland v. Washington* (1984) 466 U.S. 668, 694 [80 L.Ed.2d 674, 698] [to prevail on a claim of ineffective assistance of counsel, defendant must show there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different].)

D

There Was No Cumulative Error

Okumura seeks reversal based on cumulative error. “Under the ‘cumulative error’ doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial.” (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.) Here, we concluded no error resulted. Accordingly, there was no cumulative error.

IV

Sentencing Claims

A

Remand Is Required For Okumura

Okumura contends her case should be remanded to the trial court so she may have the opportunity to make a record of information relevant to her eventual youth offender parole hearing. The People concede Okumura should be allowed to do this and we agree.

“[T]he California Legislature passed Senate Bill No. 260 (2013-2014 Reg. Sess.), which became effective January 1, 2014, and enacted sections 3051, 3046, subdivision (c), and 4801, subdivision (c), to provide a parole eligibility mechanism for juvenile offenders.” (*People v. Perez* (2016) 3 Cal.App.5th 612, 618.) “In October 2015, the Legislature amended section 3051, and effective January 1, 2016, anyone who committed his or her controlling offense before reaching 23 years of age [became] entitled to a youth offender parole hearing. (§ 3051, subd. (a)(1), amended by Stats. 2015, ch. 471, § 1.)” (*Ibid.*) This was the version of section 3051 in effect at the time of Okumura’s sentencing. It did not apply to her, however, because she was born March 2, 1990, making her over 23 years of age at the time of the offense. Effective January 1, 2018, the Legislature increased the age of qualification to 25 years of age, thereby making section 3051 now applicable to Okumura. (§ 3051.)

As the People concede, Okumura had no reason to believe she would be eligible for a youth offender parole hearing at the time of her sentencing and thus was not

provided with any opportunity to make a record for that eventuality. Accordingly, remand is appropriate to provide her with this opportunity. (See *People v. Franklin* (2016) 63 Cal.4th 261, 284 [If the defendant lacked the opportunity to make a record for an eventual youth offender parole hearing, “then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence”].)

While on remand, the trial court is also directed to correct Okumura’s abstract of judgment to conform to its oral pronouncement. The trial court orally imposed 25 years to life for the murder conviction (count one), plus one year for the weapon enhancement attached to that count. It consecutively imposed seven years to life for the torture conviction (count two), plus one year for the weapon enhancement attached to that count. Finally, it imposed a consecutive three years for the false imprisonment conviction (count three), plus one year for the weapon enhancement attached to that count. Okumura’s aggregate sentence was 38 years to life.

Okumura’s abstract of judgment must be corrected to reflect she was convicted of false imprisonment and not kidnapping and that she received 25 years to life on count one and seven years to life on count two. The one-year weapon enhancement attached to count three must be removed from the abstract of judgment reflecting Okumura’s indeterminate sentences. Finally, her “TOTAL TIME” must be changed to 38 years to life, instead of the 34 years to life consecutive to 25 years to life as currently provided.

B

Remand Is Required For McMahon

McMahon contends his case should be remanded to the trial court for it to exercise its newly-granted discretion to strike one or both of his firearm enhancements. In supplemental briefing he extends this request to his prior serious felony conviction enhancement, which he argues the trial court has discretion to strike because his case was not final as of the effective date of amendments giving the court that authority under

sections 667 and 1385. While the People concede recent changes in the law apply retroactively to McMahon, both in the firearm enhancement context and the prior serious felony conviction enhancement context, they argue remand is unnecessary because the record shows the trial court would not have exercised its discretion to strike the firearm or prior serious felony conviction enhancements to lessen his sentence. The People also contend McMahon's abstract of judgment should be amended to accurately reflect the court's imposition of a consecutive 25-to-life sentence for the firearm enhancement attached to his murder conviction, instead of the concurrent sentence currently reflected in his abstract of judgment. The People also argue, and McMahon agrees, the case must be remanded so the court can impose a sentence on McMahon's felon in possession of a firearm conviction, which it failed to do during the oral pronouncement of sentence.

We agree with the People remand is necessary for the court to impose sentence on McMahon's possession of a firearm conviction because the court never imposed a sentence on that offense. Since McMahon's case will be remanded to the trial court, we leave it to that court whether to exercise its discretion in the first instance regarding McMahon's firearm and prior serious felony conviction enhancements. Thus, the trial court is directed to consider whether to strike McMahon's firearm enhancements pursuant to sections 12022.5 and 12022.53, and then to accurately reflect its determination in the abstract of judgment. The trial court is also directed to consider whether to strike McMahon's prior serious felony conviction enhancement pursuant to sections 667 and 1385.

DISPOSITION

Regarding Okumura, we remand the matter to the trial court for the limited purposes of: 1) affording her a meaningful opportunity to make a record of information that will be relevant for an eventual youth offender parole hearing; and 2) correcting her abstract of judgment consistent with this opinion.

Regarding McMahon, we remand the matter to the trial court for the purposes of:
1) sentencing him for his felon in possession of a firearm conviction; 2) considering whether to strike his firearm enhancements pursuant to sections 12022.5 and 12022.53; 3) considering whether to strike his prior serious felony conviction enhancement pursuant to sections 667 and 1385; and 4) correcting his abstract of judgment to accurately reflect its determination.

/s/
Robie, J.

We concur:

/s/
Blease, Acting P. J.

/s/
Butz, J.